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Supreme Court of the United States

OCTOBER TERM, 1948

No. 342

SAM ARSTEIN AND BEN ARSTEIN
Petitioners

against

ROBERT REIS & COMPANY
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reports of Opinions Below

Arstein v. *Robert Reis & Co.*, 77 N. Y. S. 2d 303; aff'd 273 App. Div. 963; leave to appeal denied 298 N. Y. —— (Advance Sheet No. 487).

Statement as to Lack of Jurisdiction

Petitioners say they invoke the jurisdiction of this Court under §1257(3) of Title 28 of the U. S. Code. That section, however, cannot sustain jurisdiction in this case, because:

A. No federal question was raised in the New York State courts.

B. No federal question was decided by the New York State courts.

C. The judgment now sought to be reviewed was not rendered by the highest court of the State of New York in which a decision could be had.

D. More than 90 days elasped between the entry of the judgment sought to be reviewed and the application to this Court for a writ of certiorari.

The foregoing jurisdictional questions will be dealt with under Point I of our argument, *post*, pp. 4-9. The merits of the case will be discussed briefly under Point II, *post*, pp. 10-11.

Statement of the Case

In November, 1947, Robert Reis & Company, a New York corporation, changed and reclassified its shares pursuant to §36 of the New York Stock Corporation Law* (R. 5, 12, 24-25). Thereby, there were eliminated substantial amounts of accrued, undeclared and unpaid cumulative dividends on the Company's previously outstanding First Preferred Stock (R. 6, 24).

Petitioners (plaintiffs below), as alleged holders of First Preferred Stock (R. 12; Cf. R. 25), objected that the recapitalization plan was "without legal sanction," and they sued for a declaratory judgment that the Company

*The pertinent provisions of §36 of the Stock Corporation Law are quoted at page 2 of the Petition for Writ of Certiorari.

had no "legal right to change and reclassify its capital stock in the manner contemplated" (R. 25). Specifically, petitioners complained of the elimination of the First Preferred dividend arrearages.

By order entered January 10, 1948 (R. 2-3) and judgment entered January 22, 1948 (R. 3-4), the New York Supreme Court, New York County, dismissed the complaint. Such determination was based upon the court's construction of certain provisions in the charter of the Company, before its recapitalization, and upon "the comprehensive opinion" in *McNulty* v. *W. & J. Sloane,* 184 Misc. 835 (R. 2-3).

The order and judgment of the New York County Supreme Court were unanimously affirmed on April 26, 1948, by the Appellate Division, First Department (R. 30), and judgment of affirmance was entered accordingly on April 28, 1948 (R. 33-34).

Petitioners took no appeal as of right to the Court of Appeals, the highest court of New York, on the ground that a constitutional question was involved (N. Y. Civil Practice Act, §588-1(a)). Instead, petitioners applied for leave to appeal on the theory that no appeal as of right existed (R. 30-32; Civil Practice Act, §589-2). The Court of Appeals denied such application on July 16, 1948 (R. 33, 34-35).

Argument

POINT I

This Court lacks jurisdiction to grant certiorari in this case.

A

No federal question was raised in the New York State courts.

While the complaint herein expressly alleged that the recapitalization of Robert Reis & Co. was pursuant to §36 of the New York Stock Corporation Law (R. 12), the constitutionality of that statute was in no way challenged. Indeed, petitioners are forced to admit that their complaint failed to allege any violation of their federal constitutional rights (Petition, p. 8). In view of this state of the pleadings, petitioners were not even in a position to contest the recapitalization on constitutional grounds (16 C.J.S. Constitutional Law §96).

Petitioners' unique contention that a New York plaintiff who disputes the constitutionality of a statute is precluded from so pleading (Petition, p. 8), is, of course, sheer nonsense. (See, *e. g.*: *Pratter* v. *Lascoff*, 140 Misc. 211; aff'd 236 App. Div. 713; aff'd 261 N. Y. 509).

Petitioners' further contention that they saved the constitutional point by arguing it in their briefs (Pet. pp. 9-10, 19-21) is equally untenable. In the first place, briefs filed in state courts form no part of the record here, and such briefs may not be used to establish that a federal question was raised below (*Lynch* v. *New York*, 293 U. S. 52, 54; *Live Oak Assn.* v. *R. R. Comm.*, 269 U. S. 354, 357-359; *Harding* v. *Illinois*, 196 U. S. 78, 84; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308; *Zadig* v. *Baldwin*, 166 U. S. 485, 488).

In the second place, all the briefs filed by petitioners in the courts below repeatedly and specifically conceded that the leading case in New York upholding the constitutionality of §36[E] of the Stock Corporation Law (*McNulty* v. *W. & J. Sloane,* 184 Misc. 835) was unquestionably correct. Thus, in their two briefs filed in the New York Supreme Court (on motion for preliminary injunction, p. 5; on motion for judgment, p. 7) petitioners agreed that Justice SHIENTAG's opinion in the *McNulty* case contained "the most detailed and scholarly disquisition of the whole problem in the decisions or learned articles." And in their brief in the Appellate Division, petitioners made the following concessions:

> "The soundness of the decision in the *McNulty* case is not questioned." (p. 6)
>
> "As already stated, appellants are not at all critical of Justice Shientag's opinion." (p. 10)
>
> "* * * of course, if the charter provision in the instant case were of the same character as in the *McNulty* case, there would be no basis for this lawsuit." (p. 11)

And in their brief seeking leave to appeal to the Court of Appeals, petitioners further admitted (p. 14):

> "Plaintiffs do not challenge Justice Shientag's opinion. It is, undoubtedly, sound."

Finally, the record made by petitioners themselves on their application for leave to appeal to the Court of Appeals removes any doubt that could remain as to whether a federal constitutional question was presented below. The New York Civil Practice Act provides alternative methods for obtaining review by the Court of Appeals. So far as pertinent to the situation at bar, the Civil Practice Act provides:

"§588. **Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division * * * provided further that (a) there be directly involved the construction of the constitution * * * of the United States * * *."

"§589. **Appeal by permission.** Appeal to the court of appeals by permission lies only

* * *

2. * * * (b) by permission of the court of appeals upon application made directly to that court, from a judgment or order of the appellate division * * * which is not appealable as of right only because it does not comply with provision (a) * * * of subdivision one of section five hundred and eighty-eight of this act."

These alternative procedures for bringing a case before the Court of Appeals are mutually exclusive. Thus, if an appeal lies of right on constitutional grounds, leave to appeal will be denied (*Jongebloed* v. *Erie Railroad Co.*, 296 N. Y. 994; *Estin* v. *Estin*, 296 N. Y. 308, 311-312; 296 N. Y. 828; *Albano* v. *Hammon*, 267 N. Y. 590). And, conversely, if an appeal is taken without leave in a case which does not directly involve a constitutional question, such appeal will be dismissed (*Matter of Jones*, 264 N. Y. 401; *People ex rel. Ryan* v. *Lynch*, 262 N. Y. 1, 4; *Matter of Levy*, 255 N. Y. 223, 224-226). In the case at bar, petitioners elected not to appeal as of right, but to seek leave to appeal. In so doing, moreover, their attorney represented under oath that:

"An appeal to this Court [the Court of Appeals] from the order of affirmance does *not* lie as of right." (R. 32)

Here, then, we have the sworn statement of petitioners' own counsel that no federal constitutional question was directly involved herein.

B

No federal question was decided by the New York State courts.

The entire controversy below centered about the interpretation to be placed on certain language formerly appearing in the charter of Robert Reis & Co. Petitioners contended that the language employed at one spot transformed the cumulative dividends payable on the Company's First Preferred Stock into "debts" which automatically ripened into "vested rights" upon accrual, without the necessity for any declaration of such dividends by the Board of Directors. The Company took the opposite position: that the old charter, when read in its entirety, simply provided for the usual sort of cumulative preferred dividends which could not become "debts" unless and until they were declared. The New York courts resolved this question in favor of the Company. Justice Botein's opinion—the only one written in the case—held as follows (R. 2-3):

> "The dividends in this case have not been declared, but have accrued by mere passage of time and the relationship of debtor and creditor has not arisen in connection therewith. A reading of the submitted charter provisions indicated that a declaration of dividends was required to establish a debtor-creditor status; not, as contended, that it was created whenever dividends accrued, regardless of action by the directors. Plaintiffs seek to distill out of the language in the old charter which they stress an obligation on the part of the corporation to pay dividends which is more in the character of a commitment to pay interest on bonds. Even were such a provision enforceable, it cannot be fairly read into the charter contract between stock-

holders and corporation; particularly in the light of other charter provisions expressly stipulating for the declaration of dividends on the preferred stock. The attempted distinction of the *McNulty* case on this ground must therefore fail."

Thus, all that was passed upon in the courts below was the construction of certain provisions in a corporate charter. Not only was no federal constitutional question presented, but no such question was decided. It follows that this Court is without jurisdiction to review (28 U. S. C. A. §344, Note 49).

C

The judgment now sought to be reviewed was not rendered by the highest court of the State of New York in which a decision could be had.

Assuming *arguendo* that a federal constitutional question was raised below, petitioners failed to have it decided "by the highest court of a State [the Court of Appeals] in which a decision could be had" (U. S. Code, Title 28, §1257). As previously pointed out (*ante*, p. 6) petitioners took no appeal to the Court of Appeals as of right —as they might have done if a federal constitutional question had been involved. This court, therefore, is precluded from taking jurisdiction (*Southern Electric Co.* v. *Stoddard*, 269 U. S. 186).

D

More than 90 days elapsed between the entry of the judgment sought to be reviewed and the application to this Court for a writ of certiorari.

The judgment here sought to be reviewed is that of the New York Supreme Court (R. 3-4), as affirmed by the Appellate Division order of April 26, 1948 (R. 30) and judgment entered April 28, 1948 (R. 33-34).

The present application for a writ of certiorari was not filed until October 7, 1948—162 days after the Appellate Division's judgment of affirmance was entered. But §2101(c) of Title 28 of the U. S. Code requires that application for certiorari be made "within ninety days after the entry of such judgment." The instant application, accordingly, was not made in due time, and the jurisdiction of this Court cannot now be invoked (*Dept. of Banking* v. *Pink*, 317 U. S. 264; rearg. den. 318 U. S. 802; *Matton Co.* v. *Murphy*, 319 U. S. 412).

The fact that petitioners made an abortive application to the Court of Appeals for leave to appeal, and that such application was denied within the 90-day period, is entirely immaterial. The Court of Appeals' denial of leave to appeal did not in any sense constitute an affirmance of the judgment of the Appellate Division (*Matter of Marchant* v. *Mead-Morrison M. Co.*, 252 N. Y. 284, 297-298). Moreover, as already shown (*ante*, p. 6), if this case really did present a federal constitutional question, petitioners should have appealed to the Court of Appeals as a matter of right under §588 of the Civil Practice Act. Instead, petitioners made a perfectly useless motion under §589. Surely, by adopting the wrong procedure in the court below, petitioners could not extend the time allowed them by statute for applying for certiorari in this Court.

POINT II

In any event, the judgment below is clearly correct.

A sentence in former paragraph (a) of the charter of Robert Reis & Co. provided that the Company should be "obligated to pay" preferred dividends "but only out of the surplus or net profits of the corporation" (R. 6). Seizing upon the single word "obligated" in this particular sentence, petitioners advanced the feeble argument that such dividends had become "debts" immediately upon accrual, regardless of whether or not they had been declared by the Board of Directors. The trouble with such argument was that it ran directly counter to other explicit provisions in paragraphs (b), (e) and (f) of the old charter, which expressly required that preferred dividends be declared in the usual way* (R. 7, 8).

It was manifest to the courts below, therefore, that the preferred stock arrearages involved in this case were not "debts" at all, but just what they purported to be—undeclared and unpaid cumulative preferred dividends. That being so, it was equally manifest that such arrearages could lawfully be eliminated through a reclassification of shares in the manner permitted by §36 of the New York Stock Corporation Law. The constitutionality of §36 had been fully upheld in Justice SHIENTAG's scholarly opinion in *McNulty* v. *W. & J. Sloane*, 184 Misc. 835, which the New York Court of Appeals had cited with approval (*Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343,

*The statement at page 3 of the Petition for Writ of Certiorari that "no declaration was required as to the dividends on the first preferred stock" is a false statement. Clause (1) of paragraph (e) of the old charter expressly referred to the requirement that First Preferred dividends be "paid or *declared*" (R. 8).

351). These petitioners were not challenging the authority of the *McNulty* case, but, on the contrary, were extolling it and conceding its soundness. Accordingly, since the charter provisions involved in this case were clearly of the same character as those considered in the *McNulty* case, the courts below had no alternative but to accept petitioners' invitation in their Appellate Division brief (p. 11) to hold that there was "no basis for this lawsuit."

CONCLUSION

The petition herein for a writ of certiorari should be dismissed; or, if not dismissed, denied.

Respectfully submitted,

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October 25, 1948.